UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

COLONIAL REST HOME, INC., d/b/a THE
CARRIAGE HOUSE OF BAY CITY

and Case 7–CA–48552

SCOTT HENSON, an Individual

Gary W. Saltzgiver and *Robert M. Buzaitis,*
Esqs., for the General Counsel.
Ellen E. Crane, Esq., for the Respondent.

DECISION

Statement of the Case

George Carson II, Administrative Law Judge. This case was tried in Saginaw, Michigan, on September 27 and 28, 2005, pursuant to an amended consolidated complaint that issued on June 28, 2005.[1] Prior to the opening of the hearing, all of the allegations of the complaint except for the alleged unlawful discharge of a supervisor were settled. The only issue before me is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging the Charging Party, an admitted Section 2(11) supervisor. As hereinafter discussed, I find no violation of the Act, and shall recommend that the complaint be dismissed.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, Colonial Rest Home, Inc., d/b/a The Carriage House of Bay City, the Carriage House, a corporation, operates a nursing home in Bay City, Michigan. The Respondent annually receives gross revenues in excess of $100,000 and purchases and receives goods and materials valued in excess of $5,000 directly from points located outside the State of Michigan. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

In the late summer of 2004, the United Steelworkers of America, AFL-CIO, CLC, hereinafter called the Union, began organizational activity at the Carriage House. An election

[1] All dates are in 2004 unless otherwise indicated. The charge was filed on April 27, 2005.

was held on September 24, and on October 4 the Union was certified as the exclusive collective bargaining representative of the Carriage House's certified nursing aides, restorative aides, activity aides, dietary aides, cooks, housekeepers, laundry employees, and maintenance workers. Initially this case was a consolidated proceeding with multiple Section 8(a)(1), (3) and (5) allegations. The Section 8(a)(5) allegations related to alleged unilateral changes that occurred after the Union's election victory. All allegations except the alleged unlawful discharge of Supervisor Scott HenSon (sic), were settled prior to the commencement of this hearing. At the commencement of the hearing, Counsel for the General Counsel amended the settled allegations out of the complaint. Counsel advised that evidence would be adduced relating to two of the settled allegations, an alleged unilateral change relating to the requirement that maintenance employees complete a checklist when cleaning the kitchen and an alleged discriminatory warning issue to employee Lewis Mitchell for failing to properly clean the kitchen. Counsel explained that the foregoing allegations were the predicate for the complaint allegation that Supervisor HenSon was terminated in violation of Section 8(a)(1) of the Act because of his "expressed reluctance" to issue the warning to employee Mitchell.

B. Facts

Scott HenSon, a certified stationary engineer and licensed senior certified health care mechanic, was hired as Maintenance Supervisor at the Carriage House by Administrator Raphael (Ray) Dubay on September 9, 2003. He was discharged on November 18, 2004. HenSon was a working supervisor who performed maintenance work such as cleaning, painting, and repairing at the facility, including plumbing, heating, and electrical work. He also supervised the work of employees Lewis Mitchell and Roy Talaga. He normally received instructions from Administrator Dubay and Director of Human Resources Maureen Hawkins. Occasionally maintenance employees at the Carriage House would perform work at the Colonnades, a separately incorporated assisted living facility that Administrator Dubay built on land owned by, and adjacent to, the Carriage House. The facilities are about 1000 feet apart.

HenSon's evaluations were performed by Director Hawkins. Those evaluations establish that Hawkins was not fully satisfied with HenSon's job performance. The evaluation dated November 6, 2003, requests that HenSon combine errands "to avoid multiple trips from the building" and cautions him about "hanging out" at the garage too much. His evaluation dated January 23 notes that "[t]hings seem to have slowed down-not seeing things getting done, X-mas tree sat in library for about a week disassembled." HenSon's six month evaluation, dated May 17, is the last evaluation he received. It notes that "[s]ome things are being put off & not done" and "you continue to run to store for one thing only-errands need to be grouped." The following day, May 18, Hawkins issued HenSon a verbal warning relating to the need to complete jobs in a timely manner, citing work on some doors and a plumbing job. The foregoing criticisms were made well prior to any union activity which did not begin until September. Although HenSon had various explanations for the matters cited by Hawkins, such as the necessity for multiple trips to perform repairs in a timely manner because the Carriage House did not stock repair items, Hawkins' failure to be satisfied with those explanations cannot be attributed to union animus. At supervisory meetings various items were brought up as maintenance tasks that HenSon contended were not his responsibility--"even if it wasn't maintenance duties, it fell upon us."

Shortly after the Union began organizing, the Carriage House held a meeting in which counsel instructed all supervisors not to unlawfully interfere with the rights of employees by interrogating them or issuing discriminatory discipline. After counsel left, HenSon recalled that Dubay stated that he would "delay delay delay" and "they'll drop it." Whether the antecedent of the pronoun "they" was the employees or the Union is not established. Dubay denied making

the foregoing comment. Even if made, the statement was not made to any employee.

Prior to the representation election, HenSon admitted having a conversation with a couple of housekeepers who opposed the Union and were expressing concern that they were going to lose their Christmas bonuses. HenSon informed them that "it can work either way," that he had been in a union and that "[i]t doesn't mean that it's a good thing or it's a bad thing." He told the employees that he understood from people who had worked there that "raises and bonuses were at Mr. Dubay's whim." Shortly after this, he was called to Maureen Hawkins' office. The head of housekeeping was present and stated to HenSon that he was upsetting the employees. Hawkins told him to keep his mouth shut.

About October 15, after the Union had been certified, Administrator Dubay approached HenSon when he and Mitchell were painting the lobby of the Carriage House. Dubay stated that he felt that Mitchell had been responsible for the organizational campaign and that he thought Mitchell was "spreading it at the Colonnades." HenSon replied that he "knew for a fact that he [Mitchell] had nothing to do with it." Dubay stated that he did not want Mitchell or Talaga "going over to the Colonnades anymore, that I was the only one allowed to go over to the Colonnades." Mitchell did not overhear the foregoing conversation. HenSon did not object to imposing the restriction. Dubay did not deny directing the imposition of the foregoing restriction.

Although Mitchell had not initiated the organization campaign, he had supported the Union. Mitchell had, on one occasion when working at the Colonnades, spoken with the chef about the Union. It was shortly after that encounter that HenSon informed Mitchell that Dubay thought that he, Mitchell, had "spearheaded" the Union and, consistent with the restriction stated by Dubay, directed that neither Mitchell nor Talaga were to go to the Colonnades.

One of the duties performed by maintenance employees at the Carriage House was cleaning the kitchen. This task was scheduled to be performed every other week on Thursday night, after the evening meal was served. Thus, each of the maintenance employees, including Supervisor HenSon, performed this task once every six weeks. On the morning of Thursday, October 21, Dietary Manager Mary Nadolny informed HenSon that Dubay wanted to institute a cleaning checklist for the kitchen. HenSon reviewed the checklist, noted the items that he did not believe were applicable and added the ceilings and floors to the checklist.

Mitchell cleaned the kitchen on Thursday, October 21. Unlike prior occasions when he worked alone, Dietary Manger Nadolny had assigned a kitchen employee to work at the same time. The employee was Carol Howard, who Mitchell knew to be "dead set against the Union." The following day, Howard reported to Nadolny that Mitchell had not spent much time in the kitchen. On October 22, HenSon accompanied Dubay, Hawkins, and Nadolny on an inspection of the kitchen. HenSon testified that Dubay's presence was unprecedented. Dubay testified that he regularly walked through the kitchen and, when doing so, observed its condition. He did not deny that his presence with Hawkins and Nadolny for a formal inspection of the previous night's cleaning was unprecedented. In the kitchen, Dubay ran his hand over some pipes and stated that they were greasy. He also noted that paint was peeling off the wall behind the dishwasher. HenSon pointed out that Dubay could not "expect us to clean, paint and do all this stuff [in] one eight hour period every two weeks … and keep this kitchen in pristine condition."

Following the inspection, Dubay told HenSon, "I want you to write Louie Mitchell up." HenSon stated that he did "not want to do it." He testified that he also stated that he thought that Mitchell "did an excellent job." Dubay repeated the instruction. HenSon stated again, "I don't want to do it," and asked Hawkins if she would "type something up for me, and I'll sign it." Dubay stated that he wanted the warning to be in HenSon's handwriting.

Dubay and Hawkins denied that HenSon stated that he did not want to issue the warning. Dubay and Hawkins recalled that, during the inspection, HenSon had also noted items that had not been properly cleaned. Both denied that he stated that he thought that Mitchell had done an excellent job. Hawkins acknowledged that Dubay stated that Mitchell needed to be written up. Dubay testified that there was a general consensus that Mitchell should be disciplined, but admitted that he directed HenSon, as department head of maintenance, to prepare the warning. Although denying that HenSon asked her to type something up, Hawkins recalled that he did comment that he "had never written anybody up before." Dubay recalls that, in addition to stating that he had never written anybody up, HenSon also stated that he "wasn't familiar how you would do that," and that he told him that Hawkins would help him if he requested assistance. HenSon did not thereafter seek any assistance from Hawkins.

In evaluating the foregoing conflicting testimony, I have difficulty fully crediting any of the witnesses. I find it improbable that HenSon asserted that Mitchell had done an "excellent" job since he himself observed some cleaning deficiencies and defended Mitchell by telling Dubay that he could not expect the maintenance employees to keep the kitchen in pristine condition when cleaning only every two weeks. Although Dubay and Hawkins denied that HenSon stated that he did "not want to do it," their admission that HenSon protested that he had never written anybody up is consistent with HenSon having first stated that he did not want to do it. In finding that he said that he did not want to, I note that HenSon did not deny also stating that he "had never written anybody up before." Thus, his reluctance was expressed in terms of unfamiliarity with the procedure, not a claim that he was being asked to perform an unlawful act.

HenSon informed Mitchell that "they had found some dust on a conduit … [and] up inside the hood" and that he had been instructed to issue him a warning. Mitchell confirms that HenSon also informed him that he did not want to issue the warning but that he and HenSon agreed that HenSon should do so to protect HenSon's job. HenSon testified that he procrastinated, but that on October 26 he was called to Hawkins' office where Dubay directed that he write the warning. HenSon did so. He did not again protest that he did not want to. Mitchell was called to the office and presented the warning. Mitchell stated that he considered the warning to be harassment and refused to sign it.

Dietary Manager Nadolny testified that there was "months of build up" on the ceiling pipes and that she was reporting "on a weekly basis that the ceilings needed to be done." Despite the fact that the problem had continued for months, no employee had previously been disciplined for inadequate cleaning.

On November 11, HenSon was called to the Human Resources office where he met with Hawkins and Dubay. Lynn Wise, who was assuming Hawkins' duties as Director of Human Resources, was also present. On October 21, when Mitchell had cleaned the kitchen, he noted on the newly instituted checklist that the strain relief on the power cord of the meat slicer was broken. HenSon did not see the completed checklist. On November 4, HenSon cleaned the kitchen and noted that the strain relief was broken. At the meeting on November 11, HenSon was issued a warning for failing to have the meat slicer repaired. The warning states that "21 days ago (10/21/04) it was noted [that the] meat slicer cord in kitchen needed repair." HenSon explained that he had not been aware of the problem for 21 days because he had not seen the checklist completed by Mitchell. He acknowledged that he became aware of the problem when he cleaned the kitchen on November 4 and claimed to have attempted to take the meat slicer for repair on a couple of occasions but was told that he could not take it because it was in use. Dubay told HenSon that he did not want HenSon to take the warning the wrong way, that he felt he was doing a good job, but that he needed "to just be a little bit more diligent in trying to get

some of the things done." Dubay directed HenSon to get the meat slicer repaired "immediately." He did so. Although a cook was using the slicer, HenSon unplugged it and took it for repair.

HenSon spoke with Nadolny when taking the meat slicer, explaining that Dubay had directed that he get it repaired immediately. He admits also telling Nadolny that she "shouldn't use the dishwasher, either," and stating he was "not responsible if anybody gets hurt." The foregoing comment related to what HenSon perceived as inconsistency in that he was being told to take the meat slicer for repair but the kitchen was continuing to operate the dishwasher with a broken electrical box. HenSon had observed on October 22 that there was a hole in the electrical box. He testified that he called Commercial Kitchen, the electrical contractor that performed work at the Carriage House, and that they "were trying to locate a waterproof box."

November 11 was a Thursday. Earlier in that week, on November 8, HenSon had gone to the Colonnades where he converted the warm water heating system to winter mode by turning off the valves to the cooling tower and opening the appropriate by-pass valve so that the water circulated only through the boiler. This task had been performed for the past three years by Lewis Mitchell who testified that, in 2001, he had improperly reset the valves resulting in antifreeze entering the water system. The error was discovered when a pinkish liquid was observed coming out of faucets. It was immediately corrected, no one was injured, and the heating system was not damaged. I need not burden this decision with the extended testimony relating to problems with the heating system at the Colonnades or the responsibility for those problems. Suffice it say that, following the 2004 changeover, several apartments at the Colonnades reported a lack of heat and the air conditioning company that had installed the system was called. The technician wrote on the service order that "cooling tower isolation valves were closed" and "bypass valve in between was still closed" leaving the impression that HenSon had neglected to assure that the warm water was circulating. At the hearing, the technician claimed that HenSon performed the changeover prematurely, that due to "fluctuations on [in] temperatures that they [the cooling tower valves] needed to be opened at that time," until there was a danger of freezing. HenSon explained that he made the changeover to assure that the pipes did not freeze. I find that HenSon performed the job properly and that the heating problem must be attributed to something else. Regardless of the actual cause of the problem, the contemporaneous report of the technician leaves the impression that HenSon was responsible. When testifying at this hearing, the technician confirmed that there had been no physical damage to the system. Nevertheless, at the time of the events, Administrator Dubay incorrectly, but understandably in view of the report of the technician, believed that the system had actually been damaged.

HenSon worked over the weekend of November 13 and 14 and then took a scheduled vacation to go deer hunting. He returned on November 18. At 4 p.m. that day, he was called to the Human Resources office. Dubay was sitting at the desk. Hawkins and Lynn Wise were present. Dubay stated to HenSon that he was an "at will employee," that he felt that HenSon was not "happy here … so I'm going to terminate your employment." He requested that HenSon turn over his key and walkie-talkie and told HenSon that he "wasn't getting things done."

HenSon denied that any specific instances relating to his performance were cited and stated that he learned of the specific reasons for which the Carriage House claimed he was terminated when he requested his personnel file in connection with a claim for unemployment compensation. The file contained a document titled Progressive Discipline that contains the verbal warning issued to HenSon May 18 relating to the need to complete jobs in a timely manner and the written warning of November 11 relating to the meat slicer. Regarding the discharge, the document cites HenSon for failing to schedule time off, thereby avoiding overtime, for three nights when he came in to paint the kitchen, for taking the meat slicer while it

was in use and telling Nadolny not to use other equipment, and for closing a bypass valve at the Colonnades resulting in a loss of heat to 8 apartments.

Hawkins testified that Dubay informed HenSon of his termination and that "everything that I have listed there [on the Progressive Discipline document] was brought up at that meeting." She acknowledged that HenSon was not provided with a copy of the document. Dubay testified that he did mention the heating problem at the Colonnades, asking whether HenSon was aware that his actions "had resulted in damage to the system," and that HenSon responded that "it couldn't have been him; he knew more than Nelson Trane [the air conditioning company] did about the system." Dubay did not testify that he mentioned any other matter and claims that the Progressive Discipline document was shown to HenSon and that HenSon read it. I credit HenSon and find that the only reason stated to him for the discharge was that he "wasn't getting things done."

Hawkins testified that she and Dubay decided to discharge HenSon on November 12, the day after he had taken the meat slicer, because of "his attitude with that" and continuing problems, "things weren't getting clean and maintained." She acknowledged that, when summarizing the incidents immediately preceding the discharge on the Progressive Discipline document, she did not specifically state HenSon's failure to complete tasks in a timely manner.

Dubay testified that the decision to discharge HenSon was made after he and Hawkins reviewed HenSon's performance for "the entire time he had been with us." He initially testified that the problem with the heat at the Colonnades played no part in the decision, but after it was pointed out that the heating problem had occurred on November 8, Dubay testified that the heating problem was "like a final thing." Thereafter, he testified that he did not have all the information that he needed until receiving the bill from the air conditioning company, which was sent by facsimile copy on November 18. Dubay's extensive testimony relating to the heating system at the Colonnades was predicated upon his misunderstanding that the system had actually been damaged. The absence of damage was not established until the air conditioning technician, who testified after Dubay, confirmed that there had been no damage to the system.

With regard to the matters set out on the Progressive Discipline document, HenSon explained that, following the October 22 kitchen inspection, where peeling paint was observed, he and Mitchell painted the wall at night. HenSon denied that anything was mentioned about overtime, that he "had worked lots of overtime." Hawkins testified that Dubay specifically told HenSon to schedule himself off on the days after he painted at night, but Dubay did not corroborate her and did not address that issue in his testimony. HenSon admits taking the meat slicer when it was in use and telling Nadolny that she "shouldn't use the dishwasher, either" because the electrical box had not been repaired. The reference to the bypass valve was obviously predicated upon the report of the air conditioning technician. HenSon and the technician disagree as to whether HenSon performed the changeover prematurely.

C. Analysis and Concluding Findings

The Respondent contends that HenSon was terminated for cause, that the warning of Mitchell was not discriminatory, and that HenSon did not express reluctance to issue it. The Respondent further argues that, even if the warning was unlawful, precedent requires dismissal of the complaint because HenSon did not refuse to issue it. The General Counsel contends that the warning to Mitchell was unlawful, that the reasons cited for the discharge of HenSon were pretextual, that HenSon was terminated because of his expressed reluctance to issue the warning, and that the discharge violated the Act.

Before addressing whether the evidence establishes that the discharge of HenSon violated the Act, it is necessary to determine whether the warning of Mitchell was unlawful. Mitchell engaged in union activity and the Respondent had knowledge of that activity and expressed animus towards it when Supervisor HenSon limited the contact of Mitchell with other employees by barring him from performing work at the Colonnades. Nevertheless, a *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), analysis is superfluous insofar as the record establishes that Mitchell was disciplined pursuant to a unilaterally changed cleaning standard. *Great Western Produce*, 299 NLRB 1004, 1005 (1990). Prior to October 21, the kitchen had, by Dietary Manager Nadolny's own admission, not been properly cleaned. She was reporting "on a weekly basis that the ceilings needed to be done," that there was "months of build up" on the ceiling pipes. Despite this, no maintenance employee was disciplined for inadequate cleaning. The Respondent's answer denies the imposition of the checklist but admits that there was no notice to or bargaining with the Union regarding any of the changes alleged in the complaint. I find that imposition of the cleaning checklist coupled with the issuance of discipline establishes that the Respondent unilaterally instituted a higher cleaning standard. If this aspect of the case had not been settled, I would find that the unprecedented warning to Mitchell, imposed pursuant to the unilateral establishment of a higher cleaning standard, violated the Act. Thus, I find that HenSon was directed to issue an unlawful warning.

The General Counsel argues that the reasons cited for HenSon's discharge were pretextual. Although Director Hawkins testified that HenSon's discharge was triggered by his taking the meat slicer coupled with continuing problems regarding things not "getting clean and maintained," the Progressive Discipline document does not cite his failure to perform jobs in a timely manner. The General Counsel further notes Administrator Dubay's contradictory testimony that the discharge decision was predicated upon HenSon's entire record prior to knowledge of the heating problem at the Colonnades, testimony that he thereafter modified.

Regarding the Progressive Discipline document, I agree that the record does not establish that HenSon failed to follow instructions by not taking time off after painting at night, thereby incurring overtime. Dubay did not testify to any such instruction, and Hawkins presented no documentation in that regard. I do not agree that HenSon was simply following Dubay's instruction in taking the meat slicer. HenSon's removal of the meat slicer while it was actually in use evinces an "I'll show him" attitude that was further reflected by his informing Nadolny not to use the dishwasher. Although HenSon did not damage the heating system at the Colonnades, the report of the technician that valves were improperly turned off establishes the basis for the Respondent's mistaken belief that HenSon had damaged the system. Although Lewis Mitchell had not been disciplined when improperly performing the changeover in a prior year, there is no evidence that the Respondent thought that he had damaged the system.

The General Counsel argues that the pretextual reasons cited by the Respondent justify an inference that the real reason for HenSon's termination was an unlawful reason, his reluctance to issue he warning to Mitchell. I agree that the citation of multiple reasons on the Progressive Disciple document, one of which I have found is not supported by record evidence, suggests that the Respondent was seeking to make a good case better. Despite this, there is no probative evidence that HenSon's October 22 expressed reluctance to issue the warning played any part in the discharge almost a month later on November 18. The Respondent, prior to any union activity, had criticized HenSon for his failure to complete tasks. HenSon's credible explanations did not alter the Respondent's perception that he was not getting jobs done as quickly as possible. It is difficult to refute perceptions with facts, and HenSon did not succeed in doing so prior to any union activity. HenSon did not repeat any reluctance to issue the warning to Mitchell on October 26 when, following his procrastination, he testified that Dubay again directed him to issue the warning. Whether the Respondent felt that HenSon was not a team

player who would fully support management in dealing with the Union is not established. Even if I assume that the Respondent, arguably because of his initially stated reluctance to issue the warning, believed, suspected, or anticipated that HenSon would not fully support management in its dealings with the Union, discharge of a supervisor for that reason does not violate the Act. HenSon did not refuse to issue the warning. He never claimed that he believed that the warning was discriminatory, and, on October 26, he did not repeat that he did not want to issue it.

Board precedent, consistent with the exclusion of supervisors from the protection of Act, interprets that exclusion strictly. In *Parker Robb Chevrolet*, 262 NLRB 402 (1982), the Board rejected prior cases that suggested that the discharge of a supervisor as an "integral part" of an employer's antiunion campaign or as a "pattern of conduct" consistent with coercing employees in the exercise of their Section 7 rights violated the Act. The Board held that discrimination against a supervisor will be found to violate the Act only when the discriminatory action impinges directly upon employee Section 7 rights stating:

> As noted above, the Board has found that, when a supervisor is discharged for testifying at a Board hearing or a contractual grievance proceeding, for refusing to commit unfair labor practices, or for failing to prevent unionization, the impact of the discharge itself on employees' Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board processes or grievance procedures, compels that they be protected despite the general statutory exclusion. In contrast, although we recognize that the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees, … this incidental or secondary effect on the employees is insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act. … The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. Id at 404 [footnotes omitted].

Thus, whether the discharge of HenSon, a statutory supervisor, violated the Act is dependent upon a determination of whether that discharge impinged upon the Section 7 rights of employees. Notwithstanding HenSon's statement that he did not want to issue the warning to Mitchell, he did so. He did not prevent Mitchell from being unlawfully disciplined.

The General Counsel argues that *Talladega Cotton Factory, Inc.*, 106 NLRB 295 (1953), which was cited in *Parker Robb Chevrolet* as an example of a case in which supervisors were discharged for failing to prevent unionization, is controlling in this case. In that case, two overseers expressed reluctance to engage in antiunion activities, but, "at the Respondent's repeated insistence, reluctantly interrogated employees under their supervision concerning their union membership, their attendance at union meetings, and their voting intentions, and informed those employees who asked for the reason for the interrogation that the "office" wanted to know." Thereafter, the Respondent informed one of the overseers that unless "he got the employees out of the Union they would get a new overseer." That overseer was discharged the day the Union won the election, and was told that "he already knew the reason." The following day the other overseer was discharged because he "let the boys join the Union.. [and that he] just didn't try hard enough" to keep them out. The Board held that, in those circumstances, where "the discharges followed immediately on the heels of the Union's victory in the Board-conducted election, the discharges plainly demonstrated to rank-and-file employees that this action was part of its plan to thwart their self-organizational activities and evidenced a fixed determination not to be frustrated in its efforts by any halfhearted or perfunctory obedience from

its supervisors. In our opinion, the net effect of this conduct was to cause nonsupervisory employees reasonably to fear that the Respondent would take similar action against them if they continued to support the Union. For this reason, we find that the discharges violated Section 8 (a) (1) of the Act." Id. at 297.

I have found no case and Counsel for the General Counsel has cited no decision after *Parker Robb Chevrolet* in which the Board has held that a supervisory discharge motivated by a supervisor's expressed reluctance to perform an illegal act impinged upon employees' Section 7 rights. In the recent case of *Southern Pride Catfish*, 331 NLRB 618, 620 (2000), cited by the General Counsel, the predicate for finding a violation was that the supervisory discharge caused employees "reasonably to fear that the Respondent would take similar action against them if they continued to support the Union." In *Southern Pride Catfish* the supervisor had compiled a list of employees who were wearing prounion T-shirts and, consistent with the respondent's instructions, informed the employees of this and that she was acting upon the respondent's instructions. As in *Talladega*, the discharge followed on the heels of the union's election victory.

In the instant case, there is no evidence that the Respondent held HenSon responsible for the success of the Union in the September election. When directed to bar Mitchell and Talaga from contact with employees at the Colonnades in October, HenSon made no objection. He edited the kitchen cleaning checklist and made no objection that instituting it constituted a unilateral change. When directed to give the warning to Mitchell for failing to clean the kitchen to pristine condition, HenSon, although stating that he did not want to, issued the warning to Mitchell. Mitchell's union activity was not mentioned. HenSon did not claim that he was being asked to commit an unlawful act. The reason he stated for his reluctance was his unfamiliarity with the process because he had never done that before. Whether HenSon's reluctance to issue the warning was colored by the fact that he himself performed the kitchen cleaning once every six weeks and knew that the higher standard would affect him is not established.

The General Counsel does not cite or address *Spring Valley Farms*, 272 NLRB 1323 (1984), cited by the Respondent, in which the Board affirmed the findings of the administrative law judge that a supervisory discharge did not violate the Act when the supervisor was not "directed to 'break up' the Union." Although asked "to 'talk' to the drivers and mill workers to ascertain their union inclinations," the supervisor "was not directed to issue any threats or promises," and "there was no evidence that any employees were aware of the request" that the supervisor ascertain their union inclinations. Although the supervisor did not carry out the Respondent's request, the Board affirmed the judge's finding that it could not "be said that her discharge was in any way related to any failure … to carry out an unlawful request." The Board also affirmed the judge's findings that the Respondent did consider the supervisor responsible for the employees selecting the Union and discharged her for that reason, but that the record did not establish "that her discharge served the unlawful purpose found in *Talladega Cotton* or otherwise presents a situation requiring vindication of employee Section 7 rights." Id at 1332.

Under *Parker Robb Chevrolet*, as applicable to this case, the Act is violated when the supervisory discharge occurs because of refusal to commit an unfair labor practice or when the discharge causes employees "reasonably to fear that the Respondent would take similar action against them if they continued to support the Union." *Southern Pride Catfish*, supra at 620. There is no probative evidence that HenSon's initially expressed reluctance to issue the warning to Mitchell had that effect. There is no evidence that HenSon, a former union member, supported the organizational effort. He stated to two housekeeping employees that "it can work either way," that he had been in a union, and that "[i]t doesn't mean that it's a good thing or it's a bad thing." There is no evidence that the Respondent held HenSon responsible for the employees' selection of the Union as their collective bargaining representative. HenSon had,

without protest, barred Mitchell and Talaga from contact with employees at the Colonnades in October, and he did not question whether the imposition of the cleaning checklist constituted a unilateral change. He agreed that the kitchen had not been cleaned to a pristine condition, and his expressed reluctance to issue a warning for a task that he also performed was couched in terms of unfamiliarity with the process, that he had never done that before. The Union was not mentioned. HenSon did not accuse Dubay of unilaterally instituting a higher cleaning standard or of retaliating against Mitchell because of his union activity. Although HenSon procrastinated in issuing the warning, the same conduct for which he had been cited regarding maintenance tasks, he did not, on October 26, repeat his initial expressed reluctance to issue the warning.

The record does not establish that the discharge of Supervisor HenSon on November 18, almost a month after his initial expressed reluctance to issue the warning on October 22, was related to that initially expressed reluctance. Furthermore, and more significantly, there is no evidence that the discharge of Supervisor Henson impinged upon the Section 7 rights of employees. I shall, therefore, recommend that the complaint be dismissed.

Conclusions of Law

The Respondent's discharge of Supervisor Scott HenSon did not violate Section 8(a)(1) of the National Labor Relations Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 30, 2005.

George Carson II
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.